IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	
	)	Chapter 13 Case
HERCULES PELZER	)	Number 95-10639
	)	
Debtor	)	
	)	
	)	
HERCULES PELZER	)	FILED
	)	at 3 O'clock & 35 min. P.M.
Plaintiff	)	Date: 1-22-98
	)	
vs.	)	Adversary Proceeding
	)	Number 97-01024A
UNITED COMPANIES FINANCIAL CORP.,	)	
A Louisiana Corporation and	)	
UNITED COMPANIES LENDING CORP.,	)	
a Louisiana Corporation	)	
	)	
Defendants	)	
	)	

ORDER

This adversary proceeding was brought by the debtor, Hercules Pelzer, against United Companies Financial Corporation ("Financial") and United Companies Lending Corporation ("Lending") complaining about post-petition actions taken by the defendants against Mr. Pelzer's home. The complaint seeks actual and punitive damages for Mr. Pelzer, contempt by defendants, an injunction to

stop Lending's dispossessory action pending in the Georgia state court, to strike Lending's claim in this case and foreclosure deed of record in the Richmond County, Georgia real estate records and to void Financial's pre-petition deed to secure debt held against Mr. Pelzer's home. Financial was granted relief from stay, not Lending. Lending had no right to foreclose on the property and therefore, the sale is void and the Georgia state court dispossessory action is moot. Mr. Pelzer failed to prove a wilful violation of the stay to justify an award of actual or punitive damages under 11 U.S.C. § 362(h), that a contempt under 11 U.S.C. § 105(a) occurred, that Lending's claim was fraudulent, or that Financial's deed to secure debt should be voided. Mr. Pelzer's claim for Lending's foreclosure deed to be stricken and set aside is therefore, granted, and the remainder of his claims are denied.

Mr. Pelzer entered into a deed to secure debt on May 16, 1990 with Financial to allow his daughter to take a $27,000.00 home improvement loan out on Mr. Pelzer's home. Mr. Pelzer signed the deed to secure debt, but did not sign the promissory note. On November 7, 1990 Financial assigned its interest in the deed to Hibernia National Bank and Financial retained the servicing of the debt. On July 22, 1991 Lending became the servicing agent for the debt. Financial is an affiliate corporation to Lending.

Mr. Pelzer filed his Chapter 13 bankruptcy case on April

25, 1995. Lending filed a secured proof of claim on May 24, 1995. On June 16, 1995 Financial sought relief from the § 362(a) stay. Subsequent to hearing, by consent order of August 2, 1995, I conditionally denied relief from stay requiring future strict compliance with the terms of the order and the loan documents. In compliance with that order, on May 13, 1996 Financial filed an affidavit alleging a default under the strict compliance order. By order filed June 7, 1996 I granted Financial relief "from the effect of the automatic stay to advertise and conduct a foreclosure sale [and entitlement] to seek to repossess the Real Property to the fullest extent allowed under the dispossessory laws of the State of Georgia subsequent to conducting a foreclosure sale on the Real Property." On June 25, 1996 Lending began foreclosure, including advertising and conducting the sale. Lending purchased the home at the foreclosure sale and received a foreclosure deed on August 6, 1996. Hibernia National Bank assigned its security deed to Lending on August 19, 1996. This adversary proceeding was filed on May 7, 1997. I will first address whether the motion for relief from stay by Financial and the subsequent foreclosure sale by Lending were validly granted and made; and if not, whether damages should be awarded to Mr. Pelzer.

I. Financial's Motion for Relief from Stay

Financial filed for relief from stay in the underlying

bankruptcy case on June 16, 1995. The motion was granted ultimately on June 7, 1996. At the time of the filing of the motion for relief from stay and the ultimate grant of the relief as requested, Financial was not a creditor of the debtor nor did it hold an interest in the real property that was the subject of the motion. The automatic stay in bankruptcy is governed by 11 U.S.C. § 362(a), and stays any act to obtain possession of property of or from the estate. 11 U.S.C. § 362(a)(3).[1] To terminate the stay a party in interest can by motion seek relief under § 362(d).[2] A motion under § 362(d) requires the movant to be a "party in interest." A moving party without a valid lien on the debtor's property is not a "party in interest" under § 362(d). See In re Dino & Arties Automatic

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[1]11 U.S.C. § 362.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

[2]11 U.S.C. § 362(d).

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

Transmission Co., Inc., 68 B.R. 264 (Bankr. S.D.N.Y. 1986); see also In re Comcoach Corp., 698 F.2d 571, 573 (2d Cir. 1983) (a non-direct creditor is not a party in interest); In re Brown Transport, 118 B.R. 889, 893 (Bankr. N.D. Ga. 1990) (same).

Financial was not a creditor or party in interest in Mr. Pelzer's bankruptcy case. Financial's original interest in the deed to secure debt was assigned to Hibernia National Bank pre-petition and the servicing of the debt was assigned pre-petition to Lending. Relief from stay to Financial should have been denied. However, on December 2, 1997 Mr. Pelzer received his discharge in the underlying case which dissolved the stay and moots the issue of further stay relief in the underlying case. 11 U.S.C. § 362(c).[3]

II. Lending's foreclosure advertisement, sale and deed execution

Section 362(a)(3) stays acts to obtain possession or control of property of the estate. Section 362(d) allows relief

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[3]11 U.S.C. § 362(c).

(c) Except as provided in subsections (d),(e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

from the stay upon request of a party in interest. Without requesting relief under § 362(d), a party is in violation of the stay if an act is taken to obtain possession of or control of property of the estate which act is in violation of the automatic stay, and is void and without effect. See Albany Partners, Ltd. v. W. P. Westbrook (In re Albany Partners, Ltd.), 749 F.2d 670 (11th Cir. 1984); Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306 (11th Cir. 1982); Barnett Bank of S.E. Ga., N.A. v. Ring (In re Ring), 178 B.R. 570 (Bankr. S.D. Ga. 1995) (advertising property for foreclosure sale before obtaining relief from stay violates stay and is void and without effect). Lending never moved for relief from stay. Therefore, its foreclosure advertisement, sale and the deed, actions taken during the pendency of the § 362 stay, are invalid. Lending has no basis to dispossess Mr. Pelzer.

III. Actual Damages, and Attorney Fees

Mr. Pelzer claims actual damages and attorneys' fees under 11 U.S.C. § 362(h)[4] for mental anguish arising from Defendants' use of the two names, Financial and Lending, in filing the secured

[4]11 U.S.C. § 362(h). Automatic stay
(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

claim, moving for relief and conducting the foreclosure. Actual damages, including attorneys' fees, are mandatory upon finding a willful violation of the stay. Flynn v. IRS (In re Flynn), 169 B.R. 1007, 1021 (Bankr. S.D. Ga. 1994), aff'd in part and rev'd in part, 185 B.R. 89 (S.D. Ga. 1995).

> In order to recover, it is necessary for the debtor to establish by a preponderance of the evidence not only that a violation of the automatic stay of §362 has occurred but also that the violation was willful. 'Willful' as used in §362(h) does not require a showing of a conscious intent to harm. What is required is a showing that the party knew of the filing of the bankruptcy petition and with that knowledge acted intentionally or deliberately. In re: Atlantic Business & Community Corp., 901 F.2d 325, 329 (3rd Cir. 1990); In re: Bloom, 875 F.2d 224, 227 (9th Cir. 1989); Aponte v. Aungst (In re: Aponte), 82 B.R. 738, 742 (Bankr. E.D. Pa. 1988); In re: Bragg, 56 B.R. 46 (Bankr. M.D. Ala. 1985).

Taylor v. U.S.A. (In re Taylor), Chapter 13 Case No. 89-11583, Adv. Proc. No. 90-1036, slip op. at 5 (Bankr. S.D. Ga. March 25, 1991) (Dalis, J.). Burnett v. Danz Carz, Inc. (In re Burnett), Chapter 13 Case No. 91-11600, Adv. Proc. No. 91-1096, slip op. at 16 (Bankr. S.D. Ga. Feb. 3, 1992) (Dalis, J.). "To support a finding of contempt on the basis of the violation of an automatic stay, the party accused must be shown to have had notice or knowledge sufficient to be aware of the proscribed conduct." Singleton v. South Carolina Student Loan Corp. (In re Singleton), Adv. Proc. No.

90-4145, slip op. at 9 (Bankr. S.D. Ga. Dec. 4, 1990) (Davis, J.). "Damages are not recoverable in the event the stay violation is inadvertent or technical." Spires v. Gracewood Fed. Credit Union (In re Spires), Chapter 13 Case No. 90-10115, Adv. Proc. No. 90-1078, slip op. at 5 (Bankr. S.D. Ga. Feb. 21, 1991) (Dalis, J.).

Recovery for Mr. Pelzer is limited to those damages he can sufficiently prove through more than mere speculation, guess or conjecture. James v. Salant Corp. (In re James), Civil Case No. 195-065, Chapter 7 Case No. 94-11550, Adv. Proc. No. 94-01071, slip op. at 2 (S.D. Ga. Oct. 31, 1996) (Edenfield, J.); Flynn v. IRS (In re Flynn), Adv. Proc. No. 93-4013, slip op. at 35 (Bankr. S.D. Ga. May 13, 1994) (Davis, J.). The plaintiff must prove by a preponderance of the evidence that the condition suffered "was an outgrowth of the § 362 violation." In re James, Civil Case No. 195-065, Chapter 7 Case No. 94-11550, Adv. Proc. No. 94-01071, slip op. at 3.

This case is distinguished from others finding a willful violation of the automatic stay for foreclosure steps taken by creditors, because relief from stay was granted to a related entity of Lending prior to the foreclosure. While Lending knew of the automatic stay and foreclosed with that knowledge, a willful violation did not occur because Lending acted on the premise that relief had been granted to foreclose on Mr. Pelzer's property.

Because Financial was a related entity to Lending and the intertwined relationship of the companies, Lending did not act with awareness of this proscribed conduct and, thus, only a technical stay violation occurred.

Furthermore, Mr. Pelzer has failed to prove actual damages resulted from the § 362 violation. His family members testified that he suffers medical problems. However these problems arose pre-petition and worsened even before the debtor realized the discrepancy in names. A foreclosure of one's house would obviously cause mental anguish, however the testimony is merely speculative and conjectural as to whether the failure of Financial and Lending to use consistent names caused Mr. Pelzer's suffering. From the testimony, his mental anguish is also attributed to his financial debt, bankruptcy, and continuing medical problems. The failure of defendants to correctly foreclose has created uncertainty but this uncertainty alone does not rise to compensable levels. Damages have not been proved and none are awarded.

IV. Punitive Damages

Mr. Pelzer's complaint alleges punitive damages in an amount not less than $250,000.00 should be awarded under 11 U.S.C. § 362(h). Section § 362(h) allows the recovery of punitive damages in appropriate circumstances. Punitive damages are awarded at the

court's discretion, In re James, Civil Case No. 195-065, Chapter 7 Case No. 94-11550, Adv. Proc. No. 94-01071 slip op. at 4, and are meant to punish, deter and fine the Defendant. In re Burnett, Chapter 13 Case No. 91-11600, Adv. Proc. No. 91-1096, slip op. at 18; In re Spires, Chapter 13 Case No. 90-10115, Adv. Proc. No. 90-1078, slip op. at 6. The amount of the fine is to be gauged by the gravity of the offense and set at a level to punish and deter. In re Burnett, Chapter 13 Case No. 91-11600, Adv. Proc. No. 91-1096, slip op. at 18. The violation must be deliberate and knowingly made or in reckless disregard of the stay. Id.; In re Spires, Chapter 13 Case No. 90-10115, Adv. Proc. No. 90-1078, slip op. at 6. The violation must be particularly egregious and the remedy extraordinary. In re James, Civil Case No. 195-065, slip op. at 4; In re Spires, Chapter 13 Case No. 90-10115, Adv. Proc. No. 90-1078, slip op. at 6.

The actions taken by Lending and Financial do not amount to particularly egregious conduct justifying this extraordinary remedy. Based upon the evidence presented, Mr. Pelzer has not shown that the Defendants deliberately knew about the violation or acted in reckless disregard of the stay. Punitive damages would not serve as punishment in this situation. Had the Defendants used consistent names, the property would likely be through foreclosure. Because of the discrepancy in names, Defendants are forced to wait to receive

the property. Punitive damages are not justified.

V. Contempt, Foreclosure Deed, Deed to Secure Debt, and Secured Claim

Mr. Pelzer further requests this court to sanction the Defendants for contempt under 11 U.S.C. § 105(a),[5] by striking the secured claim of Lending and voiding Financial's deed to secure debt. For the reasons I denied punitive damages, I do not find the Defendants' actions rose to a level of civil contempt. Furthermore, the Debtor has not provided sufficient evidence to set aside the secured claim of Lending or to void the deed to secure debt.

It is therefore ORDERED that the foreclosure deed to Lending, pursuant to the foreclosure sale, is void as violative of the § 362 stay then in effect mooting the dispossessory action now pending in the Georgia state court;

It is further ORDERED that actual damages, including attorney fees, and punitive damages are denied; and

It is further ORDERED that Defendants, Lending and

[5]11 U.S.C. § 105(a). Power of Court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Financial, are not in contempt under § 105(a); the secured proof of claim filed by Lending is not stricken; and the May 16, 1990 deed to secure debt is not voided.[6]

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 22nd day of January, 1998.

[6]In its response the defendants requested that I annul the stay of §362 under subsection (d) thereby giving effect to the void foreclosure. Annulment of the stay to give effect to prior acts taken in technical violation thereof is rarely granted and usually in circumstances evidencing misconduct on the debtor's part. In re Izzi, 196 B.R. 727, 729 (Bankr. E.D. Pa. 1996). Here, the evidence establishes only that the defendants became entangled in and tripped over a byzantine corporate web of their own doing. Annulment is not a appropriate remedy.